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No. 03-1566

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

FRANCIS A. ORFF, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents,

On Petition for A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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OBJECTION OF INTERVENOR-RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL, *ET AL.*, TO PACIFIC LEGAL FOUNDATION'S MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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Respondents-Intervenors Natural Resources Defense Counsel *et al.* object under Supreme Court Rule 37.5 to Pacific Legal Foundation's ("PLF's") motion for leave to file a merits brief *amicus curiae*. PLF's proposed *amicus* brief is untimely under Supreme Court Rule 37.3(a), because it seeks reversal or remand, not affirmance, and should have been filed by November 26, 2004, when petitioners' merits brief was due.

Supreme Court Rule 37.3(a) states that an *amicus curiae* brief "shall be submitted within the time allowed for filing the brief for the party supported, or if in support of neither party, within the time allowed for filing the petitioner's or appellant's brief." Although PLF's proposed *amicus* brief states on its cover that it is submitted "in support of intervenor-Defendant-Respondent Westlands Water District," in fact PLF's proposed brief supports petitioners' position, not the position of respondent United States or any respondent-intervenor, as it challenges the reasoning and holding of the Ninth Circuit and urges this Court either to revese or remand the lower court's ruling.

PLF advances two arguments in its proposed *amicus* brief. First, contrary to the position of all respondents, PLF contends as a threshold matter that petitioners have a state law property right to the water used to irrigate their lands. *Compare* PLF Br. at 5, 9, 12 *with* United States Br. at 34-35 n.15, 41-43; NRDC Br. at 40-

49; Westlands Br. at 24, 35-37. Second, PLF contends that the Ninth Circuit erroneously analyzed the third-party beneficiary issue, arguing that the Ninth Circuit failed to consider petitioners' purported state law property interest and Congress' supposed intent to benefit farmers in enacting the Reclamation Act of 1902, and that the Ninth Circuit's decision should therefore be reversed and remanded. PLF Br. at 15-18. Again, all respondents disagree with PLF's position – both as to PLF's analysis and its proposed result. All respondents urge *affirmance* of the Ninth Circuit, not reversal. And all respondents conclude that federal reclamation policies, as articulated in the Reclamation Act and its various amendments, *support* the decision below and do *not* establish an intent to give water users the right to bring damages suits for breach of a reclamation contract against the United States. *See, e.g.,* United States Br. at 4-5, 17-20, 49; NRDC Br. at 2-6, 28-37; Westlands Br. at 25, 33-38, 47.

Because PLF's proposed *amicus* bref supports petitioners' position, not respondents, that brief should have been lodged no later than November 26, 2005, the date on which the briefs of petitioners and their other *amici* was due. Had PLF timely submitted its proposed brief on that date, respondents could have responded on the merits to the arguments presented. However, PLF did not submit its proposed brief and accompanying motion to this Court until January 7, 2005, thus

providing respondents no opportunity to respond to the legally erroneous arguments presented in PLF's proposed brief. PLF's brief should therefore be rejected as untimely, and its motion for leave to file brief *amicus curiae* should be DENIED.

Dated: January 12, 2005

Respectfully submitted,

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